In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1063

THRIFT DRUG, A DIVISION OF J.C. PENNEY COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 1a-3a) is not yet officially reported. The decision and order of the National Labor Relations Board are reported at 215 NLRB No. 51 (Pet. App. 6a-17a).

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1975 (Pet. App. 4a-5a). The petition for a writ of certiorari was filed on January 27, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that the Union's unconditional offer to waive initiation and other fees did

not impede the employees' free choice in the representation election.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 18a.

STATEMENT

Petitioner maintains corporate headquarters in Pittsburgh, Pennsylvania, and sells retail drugs, health and beauty aids, and related merchandise. On April 6, 1973, the Union[1] filed a petition to represent a unit of all the warehousemen working in the Company's Pittsburgh warehouse-distribution center. On September 7, 1973, the Board conducted a representation election, which the Union won.[2] The Company filed objections to the election, alleging, *inter alia*, that the Union's pre-election waiver of initiation fees, fines and assessments constituted an impermissible inducement to vote for the Union.[3]

The Board's investigation of this objection revealed that the Company first introduced the topic of fees, fines and assessments, claiming that the Union was only interested in money (Pet. App. 19a-22a). To demonstrate the expenses employees might incur from unionization, the Company distributed what it claimed would represent a Union bill, stating that the initiation fee

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[1]Laborers' International Union of North America, Construction, General Laborers and Material Handlers Local Union No. 1058, AFL-CIO.

[2]53 ballots were cast for the Union, 34 against it, and 16 ballots were challenged; since the challenges could not affect the results, they were not resolved (Pet. 5).

[3]The Company has abandoned its other objections here.

could be "[*u*]*p to* $150" (Pet. App. 22a) (emphasis supplied). In response to the Company's claim that the Union was only interested in extracting fees from employees, the Union distributed a letter stating:

> This letter is to certify (in writing) that after LOCAL UNION NO. 1058 wins the NLRB election and negotiates a contract for you, the only expense to you will be the normal six dollars a month dues. There will be no initiation fees, assessments or fines. [Pet. App. 23a.]

On these facts, the Board, affirming its Regional Director, found that the Union's waiver of initiation and other fees did not warrant setting aside the election (Pet. App. 27a-28a, 29a). The Union was certified, the Company refused to bargain, and the Board, finding that the refusal violated Section 8(a)(5) and (1) of the Act, entered a bargaining order (Pet. App. 6a-17a).

The court of appeals enforced the Board's order (Pet. App. 1a-3a).

ARGUMENT

1. In *National Labor Relations Board* v. *Savair Mfg. Co.*, 414 U.S. 270, this Court held that a union impermissibly interfered with the free choice of employees in a representation election, by conditioning the waiver of initiation fees upon *pre-election* support of the union. At the same time, however, the Court made clear that the union's "legitimate interest" in overcoming the reluctance of employees otherwise sympathetic to the union "to pay out money before the union had done anything for them" could be preserved "by waiver of initiation fees available not only to those who have signed up with the union before an election but also to those who join after the election." *Id.* at 274, n. 4.

Here, the Union's offer to waive initiation and other fees was not limited to the pre-election period. Thus, the court of appeals correctly concluded that it was proper under the principles enunciated in *Savair*. Moreover, the court's decision is in accord with the decisions of other courts of appeals that have uniformly held that unconditional offers to waive initiation fees are not improper inducements under *Savair* and therefore do not impermissibly interfere with employee free choice in representation elections. See, *e.g.*, *National Labor Relations Board* v. *Wabash Transformer Corp.*, 509 F. 2d 647, 649-650 (C.A. 8), certiorari denied, No. 74-1381, October 6, 1975; *Altman Camera Co., Inc.* v. *National Labor Relations Board*, 511 F. 2d 319, 322 (C.A. 7); *National Labor Relations Board* v. *S & S Product Engineering Services, Inc.*, 513 F. 2d 1311, 1312-1313 (C.A. 6); *National Labor Relations Board* v. *Benner Glass Co.*, 514 F. 2d 641, 642 (C.A. 5), certiorari denied, No. 75-654, January 12, 1976; *National Labor Relations Board* v. *Stone & Thomas*, 502 F. 2d 957, 958 (C.A. 4); *National Labor Relations Board* v. *Dunkirk Motor Inn*, 524 F. 2d 663, 665 (C.A. 2).

Nor is a different conclusion called for because the waiver here may have encompassed a large sum of money (see Pet. 8-10). The rationale of *Savair* is that a waiver of initiation fees limited to the pre-election period is impermissible because it "allows the union to buy endorsements and paint a false portrait of employee support during its election campaign" (414 U.S. at 277). Nothing in this rationale suggests that the amount of the fee is a relevant consideration where, as here, the waiver is not limited to the pre-election period.

Petitioner's reliance (Pet. 11-12) upon *National Labor Relations Board* v. *Gilmore Industries, Inc.*, 341 F. 2d 240

(C.A. 6), is misplaced. That case was decided prior to this Court's decision in *Savair*. Moreover, contrary to petitioner's contention, the decision in *Gilmore* did not turn on the amount of the fee but on the conditional nature of the waiver. As a later decision by the Sixth Circuit made clear, "[t]he crucial question * * * is whether the Union's reduction of fees was made available to all employees in the unit for a reasonable time after the Union became entitled to recognition." *National Labor Relations Board* v. *Gafner Automotive & Machine Inc.*, 400 F. 2d 10, 13 (Phillips, C. J., concurring).

2. The court of appeals properly concluded (Pet. App. 2a-3a) that petitioner was not entitled to a hearing on its objections to the election, since no relevant fact was in dispute. Petitioner's suggestion now that a hearing was necessary to determine if the Union's waiver constituted a factual misrepresentation comes too late (Pet. 14). That contention was never raised before the Board, and thus, under Section 10(e) of the Act, 29 U.S.C. 160(e), it cannot be raised before this Court. *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 322.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1976.

DOJ-1976-03